IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 544 of 1997

WITH

CRIMINAL REVISION APPLICATION No 545 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.P.DHOLAKIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

DR VALLABHBHAI VALJIBHAI

Versus

PRAFULCHANDRA MOHANBHAI DAVDA

Appearance:

MR RR TRIVEDI for petitioner in both petitions

MR SA PANDYA, for respondent-State in 544/97

MR KP RAVAL, APP for respondent-State in 545/97

MR RD DAVE for other respondents in both petitions

CORAM : MR.JUSTICE R.P.DHOLAKIA

Date of decision: 06/04/99

COMMON C.A.V. JUDGEMENT

The present petitioner has filed the present Criminal Revision Applications against the order dated

9-9-1997 passed by the learned Sub Divisional Magistrate, Veraval in Criminal Complaint Nos.M.A.G.2188 of 1997 and 2194 of 1997 filed by the present petitioner under sec.133 of the Code of Criminal Procedure. As the complainant is same and the cause of action is similar in both these matters, I have heard both these matters together and decide by this common judgment.

2. The case of the petitioner in both the Cri. Revision Applications is that he is a medical practitioner doing medical practice at Keshod and having his dispensary at his residence situated at Sardar Patel Road, Opposite Government Hospital, Keshod. The respondent Nos.1 to 3 in Cri. Revision Application No.544 of 1997 are his neighbours and they are doing the machine repairing work on the ground floor of the said premises and there is one common wall in between the house of the parties. These respondents have constructed water tank on the upper portion of their property and there is a leakage from the said tank which creates nuisance to the petitioner. It is the further case of the petitioner that these respondents are doing the machine repairing work round the clock and because of that, petitioner could not sleep during the night time which ultimately endanger his health and his family members also.

3. The respondent Nos.1 to 3 in Cri.Revision Application No.545 of 1997 are doing the work of repairing stoves and insecticide pumps. They are staying near the petitioner. It is the case of the petitioner that when these respondents are doing the said repairing work, the bad smell which is coming out of that repairing work may spread over the whole area, which is causing injuries to the health of the petitioner and his family members in particular, and the public in general. It is also stated by the petitioner that though the above nuisance was brought to the notice of respondents, these respondents were not taking care. It is also stated that they are doing the repairing work round the clock. On the aforesaid facts, he has filed complaints being M.A.G. Nos.2188 of 1997 and 2194 of 1997 before the Sub Divisional Magistrate at Veraval. The learned Sub Divisional Magistrate, after inquiring into the matter through the Police Officer, passed an order on 9th September, 1997 rejecting the said complaints. Against that, the present petitioner has preferred these Criminal Revision Applications.

4. Heard Mr.P.M.Joshi, the learned counsel for the petitioner, Mr.S.A. Pandya and K.P.Raval, learned APPs

for the respondent No.4-State in respective petitions and Mr.R.D.Dave, the learned counsel for the other respondents in both these petitions and have gone through the complaints and the order passed by the learned Sub Divisional Magistrate.

5. It is emerged from the complaints that petitioner has filed the present complaints under sec.133 of the Cr.P.C. against the respondents on two grounds. Firstly, in Cri.Revision Appln. No.544 of 1997, there was a leakage in the water tank and though requested, the respondents were not taking care either to repair or replace it. Secondly, the respondent Nos.1 to 3 in Cri.Revision Application No.544 of 1997 are doing machine repairing work and respondent Nos.1 to 3 in Cri.Revision Application No.545 of 1997 are doing the work of repairing stoves and insecticide pumps round the clock which is affecting the health of the petitioner and that of his family members.

6. Therefore, the first question that arises for consideration is whether the case of the petitioner falls under the public nuisance or private nuisance. The next question that arises is when the power under sec.133 is required to be used.

7. The learned counsel for the petitioner has relied upon a case reported in 1993 Criminal Law Reporter (Maharashtra) page 439. In this reported case, the procedure to be followed by the Magistrate while dealing the matter under sec.133 of Cr.P.C. has been decided by the Court as under :

> "The Magistrate is supposed to hold two separate and distinct enquiries - In the first stage, the Magistrate will satisfy himself on investigation that there is an obstruction unlawful which is to be removed - An order is passed against the person for this and if he appears and denies, the second investigation will commence on the merits of the complaint".

8. In the present cases, the petitioner will not get any benefit from the above judgment because the Magistrate on satisfying himself on investigation at the first stage came to the conclusion rejecting the complaints of the present petitioner. Therefore, the question of second stage does not arise.

9. Relying on another judgment reported in 31(2) GLR page 744, the learned counsel for the petitioner has

argued that for taking action under sec.133 of Cr.P.C. upon removal of nuisance caused at a public place, it is absolutely necessary to go through the entire procedure mentioned in secs.133 to 142 of Cr.P.C.

10. There cannot be any dispute regarding the law laid down by this Court under sec.133 that for the removal of nuisance caused at a public place, it is absolutely necessary to go through the entire procedure mentioned in secs.133 to 141. Here in this case, after receiving the complaint from the complainant, the Magistrate has enquired into the matter through Police agency and after considering the report submitted by the Police Officer alongwith the material collected including the statements, etc., the Sub Divisional Magistrate has come to the conclusion that the complaint of the petitioner is required to be rejected at initial stage itself and, therefore, the petitioner will not get any benefit out of the aforesaid judgment and further procedure under sec.133 onwards are not required to be followed.

11. The learned counsel for the petitioner also relied upon another judgment reported in 1976 Cri. Law Journal(Punjab & Haryana) page 1448 wherein it has been categorically held by the Court in para 8 of the said judgment as under:

> "Wherever the legislature thought that the evidence may be adduced by way of affidavit, it permitted the parties to lead evidence by filing affidavits. There being no such provision as regards the proceedings initiated under sec.133 and the Code, and the procedure in such cases having been prescribed under sec.137 of the Code to be that of summons cases, there is no option with the trial Magistrate to accept the affidavits of the parties to adjudicate the dispute."

12. At the cost of repetition, I say that this stage comes when the Magistrate enquire into the matter and after receiving the report alongwith the statement and other evidence from the Police Officers, if he takes cognizance in the matter, then as per the above reported judgment, it should not be decided on affidavit. Here in this case, that stage has not come and Sub Divisional Magistrate has not taken any cognizance in the matter and, therefore, following of further procedure is out of question.

13. Whereas the learned counsel for the respondents has mainly argued that the act of the respondents does not fall under sec.133 of Cr.P.C. and, therefore, it is not a public nuisance. At the most, it can be said to be a private nuisance.

14. It has been observed regarding nuisance by the Supreme Court in the case reported in 1995 SCC (Suppl) 4 page 54 at Head Note `A' as under:

" Nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. It may be public or private nuisance. As defined in sec.268 IPC, public nuisance is an offence against public either by doing a thing which tends to the annoyance of the whole community in general or by neglect to do anything which the common good requires. It is an act or omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy the property in the vicinity. On the alternative it causes injury, obstruction, danger or annoyance to persons who may have occasion to use public right. It is the quantum of annoyance or discomfort in contra distinction to private nuisance which affects an individual is the decisive factor".

15. Regarding the second question as to when the power under sec.133 is to be used, the Supreme Court has held in the above reported case as under:

"Sec. 133 - Power under - When to be exercised condition precedent - Magistrate must exercise judicious discretion - proceedings not intended to settle private disputes or a substitute for civil proceedings".

It has been further held in para 5 of the above judgement that:

"No action can be taken under this Section where obstruction or nuisance has been in existence for a long period and the only remedy open to the aggrieved party was to move the Civil Court and sec. 133 is attracted only in cases of emergency and immediate danger to the health or physical comfort of the community and it could not be a substitute for the civil proceedings and the

parties should have recourse to the Civil remedy available and should not be recoursed to taking recourse to the provisions of Sec. 133 of the Code".

16. It is to be bear in mind in this case that the case made out by the petitioner in the complaint is causing inconvenience to him alone and, therefore, the case of the petitioner does not fall under public nuisance but under private nuisance. Therefore, keeping in mind the observations made by the Supreme Court in the above reported judgement, I am of the opinion that case of the petitioner falls under Sec. 133 (1)(d).

17. Now the question comes what is required to be done in these type of cases and it has been observed by this Court in a case reported in 1984 GLH, page 1090. It has been observed as under:

"The case of the nuisance made out by the petitioner is against a trade or occupation for inconvenience to him alone, referable to Clause (1)(b) and not to Clause (1)(d) of Sec. 133 of the Code. So, he has no case under Sec. 133 of the Code. If the petitioner has any grievance or a right, he can approach the civil court by getting an injunction, and in case some danger is caused by the running of the mini oil mill, to get compensation, but he cannot get his grievance redressed under Clause (b) of Sec. 133 (1) of the Code because it is not a public nuisance".

It has been further observed as under:

"No doubt, sec.133 is meant for removing public and not private nuisance and no person has a right to agitate any matter as a private dispute under sec.133, but he can bring the matter to the notice of the Magistrate and then it is for the Magistrate to take proceedings under sec.133 or not, and after he has started the proceedings, the matter will be between the Magistrate on the one side on behalf of the public at large and the person on the other side to whom notice was issued".

18. In view of the above observation, at the most the petitioner can bring the matter to the notice of the Magistrate and then it is for the Magistrate to decide whether to take the proceedings under sec.133 of Cr.P.C.

or not. Once he started the proceedings, the matter will be between the Magistrate on the one side, on behalf of the public at large, and the person on the other side to whom the notice was issued. Here in these cases, the complaints were filed by the petitioner and in turn, the Sub Divisional Magistrate has called for the report from the Police and after receiving the same, he has not taken any cognizance in the matter and, therefore, further procedure as prescribed in the Criminal Procedure Code is not required to be followed by the Court below.

19. Next question comes when the Magistrate takes cognizance of the offence. Here in this case, according to the complaint of the petitioner in Criminal Complaint No.2188 of 1997, there was a leakage in the overhead water tank and though requested, they have not taken care either to repair or replace it and as these respondents are doing machine repairing work round the clock, it will ultimately endanger the health of the complainant and his family members. Whereas according to the complaint of the petitioner in Criminal Complaint No.2194 of 1997, due to bad smell arising out of repairing work of insecticide pumps done by the respondents round the clock, the health of the petitioner and his family in particular and public in general is badly affected. It is to be noted that the fact is not as averred in the complaints. The petitioner has purchased the property very recently whereas as per the affidavit filed by these respondents, they were staying and doing business there since last about 35 years. The above facts have not been denied by the petitioner in his affidavit-in-rejoinder filed in the present proceedings. So, admittedly, these respondents were doing the machine repairing work and pipe repairing work there when the petitioner has purchased the property. After verifying the statements recorded by the Police of the witnesses, who are admittedly the witnesses of the complainant and whose names have been mentioned in the complaints by the petitioner, it appears that the petitioner has purchased the property with an open eye on the nature of the work done by these respondents. It seems that the respondents of Cri.Revision Application No.544 of 1997 are doing only machine repairing work and respondents of Cri. Revision Application No.545 of 1997 are doing the repairing work of pump and it may not be done continuously for 24 hours. Over and above, the question of leakage of water tank does not arise now because the respondents have come out with the specific averments in the affidavit with the documentary evidence that firstly they have repaired the water tank and, thereafter, it was replaced by a plastic water tank which has been proved by producing cash memo and bill to that

effect. The above fact also has not been denied by the petitioner in his affidavit-in-rejoinder. It is for the first time that the petitioner has come out with the averment in the application that the petitioner has started the factory in the said premises on 8-12-1996 and created nuisance.

20. The same question has come up before the Supreme Court wherein the Supreme Court has held in a case reported in AIR 1962 S.C 1794 at para 5 as under:

> "Where the trade of auctioning vegetables carried on in a private house in a city caused some amount of inconvenience to the people passing by the public road outside the building because of the vegetable carts which were necessarily parked on the public road, and also produced some discomfort to the people living in the locality because of the noise caused when the auction was going on, the conduct of the business cannot be prohibited under the first or second clause of S.133(1). The slight discomfort that may be caused to some people passing by the road or living in the neighbourhood cannot ordinarily be considered to be such as to justify action under S.133"

21. On going through the complaint, nowhere it is mentioned by the petitioner that the respondents have started the factory of machine repairing work from 1996 onwards. So, one can easily say that the petitioner has no regard towards truth. It is to be noted that these respondents were doing these work to earn their livelihood only and even the witnesses whom the present petitioner had relied had not supported the say of the petitioner. If one is doing the work for his own livelihood and these respondents, being blacksmiths (respondents Nos.1 to 3 in Cri.Rev.Appln.No.544 of 1997) and persons carrying out the repairing work of stoves and pumps (respondents Nos.1 to 3 in Cri.Rev.Appln.No.545 of 1997), are doing the said work since last 35 years and so, question of causing nuisance to the petitioner is not justifiable. Hence, I am of the opinion that the Court below has rightly rejected the the complaints of the petitioner.

22. These Criminal Revision Applications are rejected. Rule is discharged in both these matters.

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